UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO

WT/DS344

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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1. In its First Written Submission, the United States fully responded to the arguments made by Mexico in its First Written Submission. The United States does not intend to duplicate those arguments here. Rather, the United States wishes to address two misstatements made by Mexico at the first meeting of the Panel and the so-called "systemic arguments" raised there by Mexico and the third parties.

2. In its Opening Statement, Mexico misrepresented one of the arguments made by the United States in its First Written Submission. Mexico stated that the United States "erroneously assumes that dumping is conduct engaged in by individual importers."[1] Mexico went on to say that the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") does not address the conduct of individual importers or individual import transactions, but instead consistently prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. Likewise, in its Closing Statement Mexico attributed to the United States the "contention that importers as opposed to exporters are the parties that engage in injurious dumping."[2]

3. This is incorrect, and completely misses the point. The United States has never said that importers engage in dumping. Rather, our fundamental point has been that dumping can occur at the level of an individual export transaction. In addition, the United States has emphasized that different provisions of the AD Agreement address different aspects of an antidumping proceeding and conduct or actions by different actors. In particular, the remedy for dumping provided for in Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 9.3 of the AD Agreement is antidumping duties, which are applied to individual entries for which importers are liable for payment. Mexico's arguments, and the Appellate Body reasoning it relies on, fail to take the importer- and import-specific nature of antidumping duty assessment into account. Under this interpretation of Article 9.3, antidumping duties would be prevented from fulfilling their intended purpose as a remedy for injurious dumping for the numerous reasons set forth in paragraphs 88 through 92 of the First Written Submission of the United States.

4. A second statement from Mexico's Opening Statement that we wish to address is Mexico's accusation that the United States has failed to comply with the findings of the Dispute Settlement Body in related cases.[3] Mexico presented no evidence of this, and there is none. Beyond highlighting the absence of facts underlying many of Mexico's arguments – such as facts supporting the existence of a separate "zeroing" measure (or measures) – Mexico's statement calls into question its statements of concern over the importance of complying with multilateral dispute settlement procedures. Those procedures protect not only complaining parties who consider that a responding party has breached its obligations, but also responding

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[1] Opening Statement of Mexico at the First Substantive Meeting, para. 23.

[2] Closing Statement of Mexico at the First Substantive Meeting, para. 10.

[3] Opening Statement of Mexico at the First Substantive Meeting, para. 37.

parties against groundless, unilateral judgements of breach by complaining parties. In this regard, the United States takes note of the requirements in Article 23.2(a) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

5. Finally, the United States also wishes to address comments Mexico and several third parties have made in connection with their request that "in the interest of security and predictability" the panel follow the recent Appellate Body reports relating to the issues in this dispute. The United States explained in its First Written Submission how Mexico's conception of "security and predictability" is antithetical to how that phrase is used in the DSU,[4] and will not repeat that explanation here. However, the United States would like to note several misstatements in these comments.

6. For example, Mexico and some of the third parties argue that the findings of the Appellate Body with respect to zeroing provide a "consistent body of reasoning and findings"[5] and have "coherently and consistently addressed"[6] the issues, and therefore that reasoning and findings should be followed. The United States has demonstrated in its First Written Submission that the reasoning and findings of the Appellate Body with respect to any prohibition of zeroing in the AD Agreement has been consistent only in its results – the reasoning itself has shifted, and in fact has contradicted itself. Indeed, even panels have struggled to understand the shifting Appellate Body reasoning.

7. As the United States has also demonstrated in its First Written Submission, it is the panels in the various recent zeroing disputes that have provided coherent and well-reasoned arguments as to why the obligation to provide offsets does not extend beyond the context of average-to-average comparisons in investigations. Inasmuch as that reasoning is persuasive and, more fundamentally, correct, it is that reasoning this Panel should follow. There is nothing in the DSU or the WTO Agreement that, as one third party would have it, requires that the "decisions of the hierarchically superior body" be followed by the "lower body."[7] As that same third party itself recognizes, it is "not disputed that adopted panel and Appellate Body reports are binding . . . only on the immediate parties to the dispute."[8]

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[4] First Written Submission of the United States of America, para. 27.

[5] Third Party Oral Statement by the European Communities, para.5.

[6] Oral Statement of Thailand, para. 3.

[7] Third Party Oral Statement by the European Communities, para. 4.

[8] Third Party Oral Statement by the European Communities, para. 4.

8. In addition, the fact that there have been "numerous zeroing-related disputes"[9] has no relevance with respect to how this particular dispute should be decided. While it may indicate that some WTO Members disagree with zeroing as a policy matter, it does not prove that the AD Agreement, as written and as agreed to by all Members, prohibits zeroing in all contexts. The implication that the number of disputes on an issue – or the number of disputants favoring one position – can serve as a basis for disregarding the text of a WTO agreement in favor of a preferred policy outcome is antithetical to the function and obligations of WTO panels to apply the rules as written, and not to change them. The task faced by the Panel is whether the text of the AD Agreement itself requires offsets in the context of assessment proceedings, such as Commerce's periodic reviews identified by Mexico in this dispute. The United States takes note of the statement by Chile in its Third Party Submission that the only definitive resolution of the "zeroing" issue would be through explicit, Member-negotiated confirmation in the AD Agreement that zeroing is prohibited.[10] Indeed, that would be the case because currently no prohibition of zeroing in all contexts can be found in the text of the AD Agreement.

9. As Mexico has stated, "[This dispute] is about the correct legal interpretation of the relevant provisions of the GATT 1994 and the Anti-dumping Agreement. Mexico asks only that this panel correctly interpret these provisions giving due consideration to prior Appellate Body findings on the identical issues."[11] As the United States has already stated, this Panel must make its own objective assessment of the matter, including its own objective assessment of the correct legal interpretation of the relevant provisions of the covered Agreements. This means that if the Panel's objective assessment of the correct legal interpretation of the relevant provisions – including whether the provisions admit of other permissible interpretations – differs from an interpretation in a prior Appellate Body report, then the Panel is not bound to follow reasoning it finds to be unpersuasive or adopt a finding it considers to be incorrect.

10. To summarize the main issues in this dispute, this Panel should reject the claim that there is an unwritten measure, taken by the United States in its territory, that requires the Department of Commerce ("Commerce") to zero with respect to assessment proceedings that can be challenged "as such." The United States has explained in detail in its First Written Submission why the allegations by Mexico in its First Written Submission that it is challenging "one single zeroing measure" cannot stand.[12] Furthermore, Mexico has failed to provide evidence of the existence of any act or instrument of the United States that requires it to zero in any context. Mexico has only provided evidence of what Commerce has done in the past.

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[9] Oral Statement of Thailand, para. 2.

[10] Comunicación de Chile como Tercero, para. 7.

[11] Closing Statement of Mexico at the First Substantive Meeting, para. 3 (emphasis added).

[12] In addition, as the United States noted in its First Written Submission and Mexico acknowledged during the First Substantive Meeting of the Panel, the United States is no longer making average-to-average comparisons in original investigations without providing offsets for non-dumped comparisons.

11. With respect to the substantive arguments, the Panel should reject Mexico's request that this Panel create an obligation to reduce antidumping duties on dumped imports by the amounts by which any other imports covered by the same assessment proceeding[13] exceed normal value, notwithstanding the absence of any textual basis for such an obligation. For the reasons set forth in the United States First Written Submission, the United States respectfully requests the Panel to refrain from reading into the AD Agreement and Article VI of the GATT 1994 an obligation that is not reflected in the text. Instead, the United States requests that this Panel remain faithful to the text by finding that the U.S. actions in the assessment proceedings at issue rest upon a permissible interpretation of the AD Agreement in accordance with the customary rules of interpretation of public international law and the standard of review under Article 17.6(ii) of the AD Agreement.

[13] Mexico refers to assessment proceedings as "periodic reviews".